81-80

No. ____

FILED
AUG 17 1981
ALEXANDER L. STEVAS, CLERK

In the

Supreme Court of the United States

_____ TERM, 1981

WALTER ZANT, WARDEN,

Petitioner,

VERSUS

ALPHA OTIS O'DANIEL STEPHENS,

Respondent.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE BY THE ATTORNEY GENERAL OF LOUISIANA IN SUPPORT OF THE STATE OF GEORGIA'S PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a death penalty is imposed on the basis of a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, is the death penalty to be vacated simply because one of the aggravating circumstances is eventually set aside?

AMICUS CURIAE INTEREST

The issue presented is of profound significance to the citizens and courts of Louisiana since Louisiana has a

capital sentencing procedure modeled after that currently employed in the State of Georgia, and, because Louisiana Courts have recently resolved a substantially identical issue contrary to the Fifth Circuit's holding in *Stephens v. Zant*, 631 F.2d 397 (5 Cir. 1980).

STATEMENT OF THE CASE

Respondent Alpha Otis O'Daniel Stephens was tried January 20-21, 1975, in the Superior Court of Bleckley County, Georgia. The jury found the defendant guilty of murder. At the sentencing phase of the trial, the jury found the existence, beyond a reasonable doubt, of three statutorily provided aggravating circumstances. The jury then recommended the death penalty.

While respondent's appeal was pending, the Georgia Supreme Court held one of the three aggravating circumstances to be invalid. See *Arnold v. State*, 236 Ga. 534 (1976). Nevertheless, the Georgia Supreme Court upheld respondent's death penalty because the evidence supported the jury's findings of the other two aggravating circumstances. *Stephens v. State*, 237 Ga. 259 (1976), *Cert. denied* 429 U.S. 986 (1977).

On habeas review, the Georgia Supreme Court again held that the fact that the jury was allowed to consider an aggravating circumstance later held to be unconstitutional, did not require the vacating of the death penalty. *Stephens v. Hopper*, 241 Ga. 596 (1978), *Cert. denied* 439 U.S. 991 (1978).

On habeas application to the Fifth Circuit Court of Appeal, the accused's death penalty was vacated. *Stephens v. Zant*, 631 F.2d 397 (5 Cir. 1980).

Upon the Fifth Circuit Court of Appeal's decision in

Stephens v. Zant, supra, the Attorney General of the State of Georgia invited the State of Louisiana to participate in a petition of Certiorari to this Honorable Court.

Following review of the disputed matter, it was determined that the Attorney General of the State of Louisiana would, in accord with Rules 33, 34 and 36 of the Supreme Court Rules of the United States, participate and file an amicus curiae brief.

ARGUMENT SUPPORTING GRANTING OF THE WRIT

The State of Georgia petitions this Honorable Court for a Writ of Certiorari to review the Fifth Circuit's holding in *Stephens v. Zant*, supra. The Honorable Attorney General of Georgia asserts that "Where a death penalty is imposed on the basis on (of) a plurality of aggravating circumstances, each of which has been established beyond a reasonable doubt, the death penalty should not be set aside because one of these aggravating circumstances is set aside."

The Louisiana Attorney General concurs with the opinion of the Georgia Attorney General and wishes to express its views to this Honorable Court.

It is the Louisiana Attorney General's opinion that the holding of *Stephens v. Zant*, supra, is in direct conflict with Louisiana statutory provisions, as well as the majority view recently expressed by the Louisiana Supreme Court in *State v. Sonnier*, ___ So.2d ___ (La. 1981), (#81-K-1846). See La. C.Cr.P. section 905.3.

The Louisiana procedure established for the constitutional imposition of the death penalty is similar to that

provided by the State of Georgia. See La. C.Cr.P. 905 et seq. and Georgia Code Annotated section 27-2534.1.

The Louisiana Supreme Court has stated and frequently reiterated that Louisiana's capital punishment scheme is modeled on the Georgia procedure which was approved in *Gregg v. Georgia*, 96 S.Ct. 2909 (1976). Our statute, as Georgia's, provides for a bifurcated determination of an accused's guilt and punishment. At the sentencing hearing, the Georgia and Louisiana legislation both provide that the jury must consider whether certain specified aggravating circumstances exist and whether any mitigating circumstances are present. Only one aggravating circumstance need be found under the Georgia and Louisiana legislation to support a sentence of death. Further, other similarities exist between the Georgia and Louisiana legislative schemes: the jury must specify the aggravating circumstances found; the State Supreme Court must consider as part of its mandatory review whether the sentence was influenced by passion, prejudice, or any other arbitrary factor, whether the evidence supports the finding of statutory aggravating circumstance, and whether the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See *State of Louisiana v. David Martin*, 376 So.2d 300 (La. 1979) and *State v. Williams*, 383 So.2d 369 (La. 1980).

The Louisiana Supreme Court has consistently interpreted Louisiana legislation to require the finding of *one* aggravating circumstance to justify the imposition of the death penalty. Article 905.3 of the Louisiana Code of Criminal Procedure pertinently provides:

> "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that *at least one statutory aggravating circumstance exists* and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances." (Emphasis added).

Since *State v. Martin*, supra, through the recent case of *State v. Elmo Patrick Sonnier*, supra, the Louisiana Supreme Court has indicated that only one statutorily provided aggravating circumstance need be proven beyond a reasonable doubt. See also *State v. Williams*, supra, and *State v. Colin Clark*, 387 So.2d 1124 (1980).

It is the Louisiana Attorney General's reasoned and professional belief that the Fifth Circuit Court of Appeal's ruling in *Stephens v. Zant*, supra, is in substantial conflict with current Louisiana jurisprudence.

In *State v. Elmo Patrick Sonnier*, supra, the defendant was convicted of first degree murder and sentenced to death following a penalty hearing.

The evidence presented by the State at the penalty trial established that the defendant and his brother kidnapped a young man and young woman, robbed them, burglarized their automobile, and raped the woman. Afterward, at the defendant's instigation, the two young persons were killed.

The jury found that the evidence established five aggravating circumstances. The jury found that the offender was engaged in the perpetration of an aggravated kidnapping, an aggravated burglary and an armed rob-

bery. The Court found that the evidence supported those findings. The jury also found that the defendant knowingly created a risk of death or great bodily harm to more than one person. Because the defendant killed both victims in a single and consecutive course of conduct, the evidence also supported that finding.

The jury's finding that the murder was committed in an especially heinous, atrocious or cruel manner was questioned by the Court in light of this Court's opinion in *Godfrey v. Georgia*, 100 S.Ct. 1759 (1980). The Court stated:

> "In the present case the jury's findings that the homicides were committed in an especially heinous, atrocious or cruel manner were of questionable constitutional validity. The jury was not instructed on the proper narrow construction of the statute." (at p. 16 of slip opinion).

Although the Court concluded that the evidence did not adequately support the jury's finding regarding one of the aggravating circumstances, it nevertheless affirmed the death sentence. The Court said:

> "The failure of one aggravating circumstance in this case does not so taint the proceedings as to invalidate the other aggravating circumstances found or the sentence of death." (at p. 16 of slip opinion).

CONCLUSION

Since the Fifth Circuit's resolution of the issue presented in *Stephens v. Zant* seems to be in substantial conflict with *State v. Sonnier*, supra, and Louisiana Code of Criminal Procedure section 905.3, the Louisiana Attorney General respectfully urges this Honorable Court

to grant the State of Georgia's timely petition for Writ of Certiorari.

Respectfully submitted,

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